

(2008) 06 BOM CK 0162
In the Bombay High Court
Case No : First Appeal No. 22 of 2008

Xavier D'Souza and Another	Vs	APPELLANT
Luis D'Souza and Another		RESPONDENT

Date of Decision : 25-06-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Land Acquisition Act, 1894 — Section 12(2)
Limitation Act, 1963 — Article 58, 59
Registration Act, 1908 — Section 17, 30(2), 47, 51, 55
Transfer of Property Act, 1882 — Section 3

Citation : (2009) 1 BomCR 250

Hon'ble Judges : Britto N.A., J

Bench : Single Bench

Advocate : D. Pangam, for the Appellant; S.D. Padiyar, for the Respondent

Final Decision : Dismissed

Judgement

Britto N.A., J.—Heard Mr. D. Pangam, learned Counsel on behalf of the Appellants and Mr. S.D. Padiyar, learned Counsel on behalf of the Respondents.

2. Admit. By consent heard forthwith.

3. This is plaintiffs' appeal against rejection of plaint by Order dated 1-12-2007 of the learned Civil Judge, Senior Division at Panaji.

4. Briefly stated, the Plaintiff No. 1 and defendant No. 1 are brothers. Plaintiff No. 2 and defendant No. 2 are their respective spouses. The Plaintiff No. 1 is a businessman as can be seen from the cause title and works abroad whilst the defendant No. 1 is a lawyer by profession. Plaintiff No. 1 and defendant No. 1 shall be hereinafter referred to as plaintiff and defendant, respectively.

5. There is no dispute that a sale deed was executed between the plaintiff and the defendant on one side, and Mr. Tito Menezes and his wife on the other side, and this sale deed pertained to property surveyed under Nos. 59/7 and 60/0 of

Village Talaulim. This sale deed was executed on 25-10-1988 and lodged for registration on the same day.

6. Claiming that the plaintiff came to know for the first time on 19-1-2005 that the said sale deed was jointly executed in favour of the plaintiff and defendant the plaintiff filed Special Civil Suit No. 42/2007/B, for

(a) a declaration that the plaintiffs are the exclusive owners in possession of the suit property and the defendants have no right, title or interest whatsoever in the suit property or any part or portion thereof,

(b) a declaration that the name of defendant No. 1 appearing in the occupant's column of survey No. 60/0 and 59/7, be deleted and

(d) a decree and order of permanent injunction to restrain the defendants, their servants, etc. from interfering with the suit property.

7. The defendant filed an application dated 7-6-2007, for rejection of the plaint, under Order 7, Rule 11, C.P.C. taking several objections and, inter alia, stating that the plaintiffs were challenging the sale deed dated 25-10-1988 registered under No. 815/91 on 22-8-1991 and the suit was filed on 31-3-2007, and, any challenge to such a deed either for its cancellation or ratification was required to be instituted from the date of knowledge and even for seeking a declaration relating to such an instrument the limitation period was of three years.

8. It appears that at the stage of arguments certain documents were produced by the defendant but according to the learned Counsel for the defendant, the said documents were none other than the documents which were produced along with the written statement filed by them, and which were referred to in the plaint, but the dates of execution of the same were suppressed by the plaintiff.

9. The learned trial Court referred to the case of T. Arivandandam Vs. T.V. Satyapal and Another, and observed that the plaintiff would have been required to be examined as regards the date of the said Award and the date of his receiving compensation, etc. but that exercise would not be required to be done since the notice u/s 12(2) of the Land Acquisition Act was produced by the defendant. The learned trial Judge was conscious of the fact that the Court for the rejection of the plaint u/s 7, Rule 11, C.P.C. was required to look only into the pleadings of the plaintiffs and was not required to look into the documents produced by the defendant but the learned trial Court proceeded to hold that the plaintiff had suppressed material facts in the pleadings and the documents produced by the defendant supplied the omissions and therefore the said documents produced by the defendant could be looked into and upon perusal of the same it noted that the Award was passed on 27-1-1994 and notice was issued on 18-4-1994 u/s 12(2) of the Land Acquisition Act, 1894, and, further noted that the said Award disclosed that compensation was paid to the plaintiffs and the defendants on 50:50 basis. Therefore, the learned trial Court concluded that the plaintiffs were aware of the sale deed at least from January, 1994 and

the challenge to the said sale deed executed in the year 1988 was hopelessly time barred and therefore the learned trial Court proceeded to reject the plaint in terms of Clause (d), Rule 11, Order 7, C.P.C.

10. Mr. Pangam, learned Counsel on behalf of the plaintiffs submits that the plaint could not have been rejected on the basis of the documents produced by the defendants, even by referring to the dates which appeared on the documents, so produced. Relying upon the case of Popat and Kotecha Property Vs. State Bank of India Staff Association, learned Counsel further submits that the statements in the plaint has to be looked into without any addition or subtraction and if on the basis of such statement the plaint can be said to be barred by any provisions of law then only the powers under Order 7, Rule 11, C.P.C., can be exercised and not otherwise. Mr. Pangam, learned Counsel has also placed reliance on the case of Shivrudra Shivling Pailwan and Others Vs. Prakash Maharudhra Pailwan and Others, wherein this Court observed that undoubtedly Order 7, Rule 11(d) of C.P.C. provides that the plaint shall be rejected in case when the suit appears from the statement in the plaint to be barred by any law. The object behind such provision of law being to avoid manifestly vexatious and merit less litigation and to protect the parties being unnecessarily harassed by others. Clause (d) of Rule 11, Order 7, C.P.C. would apply to the cases when it would reveal from the contents of the plaint that the suit is barred. In other words, in order to enable the Court to arrive at the conclusion that the suit filed by the plaintiff is barred, the pleadings in the plaint should apparently disclose the facts revealing the bar to the suit instituted by the plaintiff. The conclusion under Clause (d) regarding the bar to the suit cannot be arrived at on the basis of materials extraneous to the pleadings in the plaint. The jurisdiction of the Court to take action under Order 7, Rule 11(d), C.P.C. can arise only in case where the pleadings in the plaint are sufficient to disclose the bar to the suit, and not otherwise. Learned Counsel therefore submits that this is a fit case for remand so that the point of limitation can be tried as a mixed question of facts and law, after evidence is led by the parties.

11. On the other hand, Mr. Padiyar, learned Counsel on behalf of defendant concedes that the documents produced by the defendants could not be looked into even for the purpose of ascertaining the dates with reference to the documents referred to by the plaintiffs in the plaint. Nevertheless, Mr. Padiyar, learned Counsel submits that the plaint read as a whole clearly discloses that the relief sought by the plaintiffs are clearly time barred. Learned Counsel on behalf of the defendant further submits that the plaintiff have not pleaded a number of dates on which the documents came to be made which are otherwise referred to in the plaint so as to camouflage the cause of action and keep the same beyond limitation. Mr. Padiyar, learned Counsel has further submitted that the plaintiff has not sought the cancellation of a sale deed nor have made the sellers or their legal representatives as parties to the suit. It is further contended that the plaintiff was very much a party to the sale deed executed on 18-10-1988 and therefore he had both actual and constructive notice of the contents of the sale

deed and therefore now cannot be heard to say that he came to know about the contents only in the year 2005 when the sale deed is alleged to have been produced before the District Court. Mr. Padiyar, learned Counsel has referred to the provisions of Section 3 of the Transfer of Property Act, 1882 and to Sections 17, 47 and 60 of the Registration Act, 1908 to support his submissions. Mr. Padiyar has also placed reliance on a number of Judgments to which a brief reference can be conveniently made.

12. In the case of (Shri Rajendera Vassudev Porob Dessai Deshprabku Rauraje and Ors. v. Smt. Sitadevi alias Jaya Raghuraj Deshprabhu and Ors.) 2005 B.C.I. 9 (unreported judgment of this Court dated 15-9-2005 in First Appeal No. 111 of 1999) the Court took note that the suit was filed for a declaration that the plaintiffs were the exclusive owners of the suit property and for a decree that the entry in the office of the City Survey at Mapusa, in the name of late Raghuraj Vassudev Deshprabhu was an erroneous entry and it should be corrected accordingly and also be cancelled. This Court noted that both the said prayers would show that both prayers related to declaration and though the entry in the City Survey record of which declaration is sought was made on 29-12-1978, the suit came to be filed on 1-2-1990. The Court noted that in para 6, except a vague statement that to the surprise of the original plaintiff, it was noticed some time back when the plaintiff inspected the file in the City Survey Office and found that the name of Raghuraj was recorded along with the original plaintiff, there was no specific date given. This Court further noted in para 13 that though it was averred that the cause of action arose in the month of June, 1989, the same cannot be accepted for want of specific date on which the plaintiff came to know that the name of his brother Raghuraj was also recorded along with him. The limitation for the declaration as prayed for by the plaintiffs was covered by Article 58 of the Limitation Act, 1963, which provides for three years when the right to sue first accrues. Apparently, the Court observed that the suit was time barred. The Court noted that it had to be presumed in the circumstances that the original plaintiff was aware of the said entry when it came to be made in the year 1978 or immediately thereafter and since the suit was filed in the year 1990 the same was clearly time barred.

13. In the case of Raj Narain Sarin (Dead) through Lrs. and Others Vs. Laxmi Devi and Others, , the Apex Court noted that on the analysis of the plaint, apart from there being a mere bald statement that the sale deed has nothing to do with the rest of the area i.e. 6 bighas, 13 biswas and the bungalows built thereon which stand to be owned and possessed by the plaintiff and prior to him by Munni Lal, there is no other averment tracing the title for 6 bighas and 13 biswas. Admittedly, several portions of the plot stood demarcated as being 3 bighas, 13 biswas and the other being 6 bighas 13 biswas; whereas there was no dispute as regards 3 bighas 13 biswas but the conferment of title on the plaintiff as regards 6 bighas 13 biswas is not available in the plaint itself. The plaint is totally silent on that score, though, however, the existence of the deed of sale noticed above stands accepted by the plaintiff. The Court proceeded to hold that

in their view the litigation could but be termed to be utterly vexatious and abuse of the process of Court, more so by reason of the fact that the deed of sale being executed as early as 1941 stands unassailed for a period of over 50 years. The Court further noted that the decision of that Court in the case of T. Arivandandam v. T.V. Satyapal (supra) had its due application and having regard to the decision as noticed above and upon consideration of the relevant provisions as engrafted in the Code itself, they had no hesitation in accepting the order of the learned Additional District Judge.

14. In *Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others*, the Apex Court has reiterated that the real object of Order 7, Rule 11 of the Code is to keep out of courts irresponsible law suits. Therefore, Order 10 of the Code is a tool in the hands of the courts by resorting to it and by a searching examination of the party, in case the Court is prima facie persuaded of the view that the suit is an abuse of the process of the Court, in the sense that it is a bogus and irresponsible litigation, the jurisdiction under Order 7, Rule 11 of the Code can be exercised.

15. In *N.V. Srinivasa Murthy and Others Vs. Mariyamma (dead) by Proposed LRs. and Others*, the Apex Court took note of the averments in para 9 of the plaint and noted that it was apparent that the cause of action for obtaining a registered reconveyance deed from the defendants in favour of the plaintiffs first arose on 25-3-1987 when the entire loan amount was alleged to have been repaid and an oral promise was given by the defendants to reconvey the suit lands. Thereafter, the Apex Court took note of the averments in paras 11 and 12 of the plaint and then proceeded to observe that the pleadings showed that the foundation of the suit was that the registered sale deed dated 5-5-1953 was, in fact, only a loan transaction executed to secure the amount borrowed by the plaintiffs predecessor. The amount borrowed was alleged to have been fully paid back on 25-3-1987 and in acknowledgment thereof a formal receipt was obtained. At the same time, there was an alleged oral agreement by the defendants to reconvey the property to the plaintiff by registered deed. On the above averments, relief of declaring the registered sale deed dated 5-5-1953 to be a loan transaction and second relief of specific performance or oral agreement of reconveyance of the property by registered instrument should and ought to have been claimed in the suit. A suit merely for declaration that the plaintiffs are absolute owners of the suit lands could not have been claimed without seeking declaration that the registered sale deed dated 5-5-1953 was a loan transaction and not a real sale. The cause of action for seeking such a declaration and for obtaining reconveyance deed according to the plaintiffs own averments in para 9 of the plaint, arose on 25-3-1987 when the plaintiffs claimed to have paid back the entire loan amount and obtained a promise from the defendants to reconvey the property. Reckoning the cause of action from 25-3-1987, the suit filed on 26-8-1996 was hopelessly barred by time. The Apex Court also noted that the averments of para 12 of the plaint concerning the mutation proceedings before the Revenue Authorities did not furnish any fresh cause of action for the suit and

they appear to have been made as a camouflage to get over the bar of limitation. Thereafter the Apex Court referred to the said case of T. Arivandandam v. T.V. Satyapal(supra) and reiterated the law that if on a meaningful -not formal reading of the plaint it is found that it is manifestly vexatious and merit less in the sense of not disclosing a clear right to sue, it should exercise its power under Order 7, Rule 11, C.P.C. taking care to see that the ground mentioned is fulfilled. If clever drafting has created the illusion of a cause of action, the Court must nip it in the bud at the first hearing by examining the party searchingly under Order 10 C.P.C. An activist Judge is the answer to irresponsible law suits.

16. In Hardesh Ores Pvt. Ltd. Vs. Hede and Company, the Apex Court has stated that the language of Order 7, Rule 11, C.P.C. is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the plaint, if taken to be correct in their entirety, a decree would be passed. The averments made in the plaint as a whole has to be seen to find out whether Clause (d) of Rule 11 of Order 7 is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without any addition or subtraction of words or change of its apparent grammatical sense.

17. Section 3 of the Transfer of Property Act, 1882 deals with interpretation clause and it states that "a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. Explanation I further provides that where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part thereof , or share or interest in such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not at all situated in one sub-district, or where the registered instrument has been registered under Sub-section (2) of Section 30 of the Indian Registration Act, 1908 from the earliest date on which any memorandum of such registered instrument has been filed by any sub-registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated provided that:

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 and the rules made thereunder,

(2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept u/s 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept u/s 55 of that Act.

18. As already stated, the plaintiff and the defendant are brothers and while the former is a businessman as stated in the cause title the latter is a lawyer. The plaintiff works abroad. After the execution of the sale deed on 25-10-1988 to which the plaintiff was a party, the plaintiff claimed that the defendant got it hurriedly registered. In para 9, the plaintiff stated that he proceeded abroad to resume his job and the said sale deed was collected by the defendant and retained in possession. In para 10, the respondent speaks of his return on leave in the year 1989 and whereupon the defendant informed him that the sale deed was misplaced. In para 11, the plaintiff pleaded that he went abroad and again returned in September, 1990 and inquired with the defendant about the sale deed and the defendant informed him that the sale deed was not traced. In para 12, the plaintiff stated that thereafter he went abroad to resume his job assignment in the year 1995 and returned back on leave in the year 1995 itself and thereafter again went to Kuwait in the year 1996 and again returned in the same year. In para 13, the plaintiff has made averments about the acquisition of 875 sq. meters of the suit property and having received an amount of Rs. 19,032/- but has cunningly avoided not to make any averment whether the defendant received an equal amount or any amount on account of the said acquisition or the date of the receipt of the same. In para 13, the plaintiff has stated that he filed an application for enhancement of compensation and the matter was referred to the District Court where it remained pending for about six years and the plaintiff was granted exclusive enhancement at the rate of Rs. 30/- to Rs. 75/- and when execution proceedings were filed and the Government deposited the amount of Rs. 1,00,000/- the defendant filed his application to allow him to join as interested party in the said execution claiming half share in the said amount deposited in the Court and in support thereof the suit property on 19-1-2005, and it is the case of the plaintiff that the first time on 19-1-2005 he saw the said sale deed when it was produced before the Court and was surprised and shocked to know that the defendant had fraudulently with mala fide intention and ulterior motives executed the sale deed jointly in favour of the plaintiff and the defendant on 25-10-1988 for a total consideration of Rs. 1,99,000/- whereas the total amount paid to Shri Menezes was Rs. 3,50,000/-. Thereafter, the plaintiff has pleaded the cause of action in para 32 stating that it arose for the first time on 19-1-2005 when the plaintiff got the copy of the said sale deed and the cause of action arose in the second week of March, 2007 when the defendant came to the site and abused the plaintiff with filthy words, etc.

19. Admittedly, the plaintiff and the defendant were both parties to the sale deed dated 25-10-1988. The plaintiff is a businessman as stated by him while the defendant is a lawyer. The sale deed in their favour was executed by Shri Menezes. The plaintiff obviously has not challenged the said sale deed for in that event the plaintiff is bound to lose his right under the said sale deed nor has made the said Shri Menezes or his legal representatives as parties to the suit. As

already seen, the plaintiff has sought, inter alia, for a declaration that it is the plaintiffs who are the exclusive owners in possession and enjoyment of the suit property and the defendants have no right, title or interest whatsoever in the suit property or any portion thereof.

20. Article 59 of the Limitation Act, 1963 provides for the period of three years to cancel or set aside an instrument or decree or for the rescission of a contract from the date when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first became known to him. Learned Counsel on behalf of the plaintiff, has fairly conceded that the Award of the L.A.O. was made on 27-1-1994. Reference has been made to the said Award and the plaintiffs having been paid a sum of Rs. 19,032/-, but there has been suppression of how much was paid to the defendant under the same Award. The plaintiff was a party to the sale deed along with his brother, the defendant. The plaintiff is a businessman. That the plaintiff did not know what the document stated when it was executed, is a fact which cannot, on the face of it, be accepted. Plaintiff being a party to the sale deed is presumed to have known what document he executed and therefore the plaintiff after a gap of almost 18 years cannot come and seek a declaration that it is only the plaintiff who is the exclusive owner of the suit property. On the face of it such a relief is time barred.

21. It does not require a discerning eye to see that in para 13 of the plaint the plaintiff has suppressed the date of the Award and the fact that the defendant also received equal sum of compensation received by the plaintiff. This is self evident and can be seen from a meaningful reading of the plaint and did not require the plaintiff to be examined under Order X, C.P.C. It can be seen that the plaintiff has made efforts to get such a relief in suppressing the dates of various documents referred to by him. There can be no other explanation for not mentioning the dates. The omission is intentional and is made to deceive the Court. Looked from this view, the rejection of the plaint under Order 7, Rule 11(d) could not be faulted. Moreover, now it is fairly conceded by learned Advocate of the plaintiff that the Award was in fact made on 27-1-1994 and being so the plaintiff knew at least by then that the property was purchased by both and for that reason compensation was given to both of them. This is not a case for the plaintiff to have got surprised and shocked for the first time on 19-1-2005 but certainly for the defendant to get one that his own brother after such a long gap should have filed an irresponsible suit by false averments and suppressing the truth. The suit is absolutely vexatious and abuse of the process of the Court. The appeal therefore deserves to be dismissed with exemplary costs of Rs. 10,000/- which the plaintiff is required to pay to the defendant within a period of thirty days.

22. On behalf of the defendant, it is submitted that a sum of Rs. 5000/- be paid to the State Legal Services Authority. The defendant is free to remit the same to the S.L.S.A. after receiving the same from the plaintiff.

Appeal dismissed